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Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 129

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, RUSSELL VAN HORN, et al., as a committee for Bondholders, and MORRIS GREEN,
Respondents.

No. [redacted] 130

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Kentucky Fuel Gas Corporation, and MORRIS GREEN,
Respondents.

No. [redacted] 131

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, CLINTON M. HARBISON, Trustee for American Fuel and Power Company, et al., and LOUIS A. GREEN, and ROBERT HEILBRUNN, as a committee for Note Holders,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT

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May 29, 1946

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COLUMBIA GAS & ELECTRIC CORPORATION, *Petitioner,* v. UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, RUSSELL VAN HORN, et al., as a committee for Bondholders, and MORRIS GREEN, *Respondents.*	No. .....
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Columbia Gas & Electric Corporation, a Delaware corporation, respectfully prays that a writ of certiorari issue to review the orders, judgments and decrees of the United States Circuit Court of Appeals for the Sixth

Circuit, entered in the above causes, October 9, 1945, (vol. 9, pp. 1-2)[1] as amended by order of said Circuit Court of Appeals entered November 26, 1945, (vol. 9, p. 46), amending and affirming, as amended, a judgment of the United States District Court for the Eastern District of Kentucky, filed October 30, 1943 (vol. 1, p. 604-5). As thus finally amended the effect of the order of the Circuit Court of Appeals was to require that the claims of the petitioner against three debtor corporations, filed in three Chapter X bankruptcy reorganization proceedings before said District Court, be subordinated "to the claims of all other creditors of every class". Your petitioner seasonably filed with said United States Circuit Court of Appeals its petition for rehearing and modification of said judgments, as amended, and said petition was received and considered by said Court and denied by order entered January 21, 1946. On April 12, 1946, an order was granted by Honorable Harlan F. Stone extending the time for filing the petition for writ of certiorari to June 1, 1946.

A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

SUMMARY STATEMENT

(1) Issues Presented.

The petition presents a single question of law, believed to be of unusual public importance in the administration both of the Bankruptcy Laws and of the Anti-Trust Laws, and not heretofore considered by this Court, viz:

Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquir-

[1]Record references appear in parentheses.

ing the credit he violated the anti-trust laws, be subordinated to other creditors?

In these cases the petitioner had purchased, in the early months of 1930, on the open market, First Mortgage Bonds of two operating companies (Inland Gas Corporation and Kentucky Fuel Gas Corporation) of a value of $2,404,800 and had paid the full market price therefor; *subsequently,* on October 30, 1930, it purchased the capital stock of the holding company (American Fuel & Power) which in turn owned most of the shares of the two operating companies; *and thereafter* it purchased $894,100 additional First Mortgage Bonds of the two operating companies and paid the full market price therefor.[2]

The order of which review is sought requires subordination of petitioner's claims to the claims of "all other creditors of every class", thus subordinating petitioner's claims upon First Mortgage Bonds of the operating companies *for which it paid full value,* not only to claims of other creditors of the operating companies, but apparently also to claims of creditors of the holding company which held the operating company stocks.

The case does not fall within the *Deep Rock* doctrine (*Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307), since (1) in that case, the claim was not purchased for value, but was created by the claimant itself in its own favor during the period that it owned all of the stock, and was in full control, of the subsidiary and (2) in the *Deep Rock* case, there was a long history of actual injury done by the controlling company to the Deep Rock Company and its

[2]Petitioner also purchased $45,000 of Debentures of the operating companies before October 30 and $672,700 of such Debentures after October 30.

security holders, and in the present case there is no finding of injury.

We submit that the governing principles in this case, overlooked by the Courts below, are:

> *First,* that the bankruptcy court adjudicates private property rights, and that this is not a proceeding for the vindication of the public interest under the anti-trust laws.
>
> *Second,* that in such adjudication, as a Court of Equity, the bankruptcy court recognizes the full rights of a purchaser for value who is bona-fide in the sense that he did no injury to other creditors.

The first point has become law of this very case, by the decision of this Court in *Columbia Gas & Electric Corporation* v. *American Fuel & Power Company,* 322 U. S. 379, in which this Court had dismissed Columbia's earlier appeal upon the ground that the case was not one under the anti-trust laws but was one in bankruptcy. In support of the second point, the fact that no injury was done to other creditors is established by the undisputed findings of fact of the District Court.

(2) History of the Litigation.

With a view to reorganization, the dispute between petitioner and the other creditors was amicably settled in 1940. The settlement was approved by the District Court. One of the creditors, having objected to the settlement appealed; and the burden of the argument favoring the settlement was assumed by counsel[3] for another creditor who, as it happened, had himself taken a large part in

[3]Arthur Logan, Esq. of the Delaware bar.

initiating the attacks upon petitioner. Petitioner was not represented or present in the Circuit Court of Appeals, for it was not a party. The upshot was that, in an opinion by Circuit Judge Hamilton, the Sixth Circuit Court of Appeals reversed the order of the District Court and remanded the causes with an order that

> "all claims or stock interest of the Columbia in the debtors', title to which it acquired in violation of Section 7 of the Clayton Act,[4] * * * be rejected and the Columbia take nothing thereby." (122 F. (2d) 223).

We refrain from commenting upon the language of the opinion, but we *earnestly request* this Court to read that opinion in its entirety before passing upon our present petition for certiorari.

After that opinion had come down, petitioner's counsel pointed out to Judge Hamilton that it had not been present in Court or had a hearing; whereupon he inserted the statement which appears in the opinion, to the effect that petitioner was not bound by the statements in the opinion (122 F. (2d) 223, 228). An extensive trial was then had before District Judge Ford, at the conclusion of which he filed full findings of fact. In lieu of filing independent conclusions of law, he quoted from the opinion of the Circuit Court of Appeals, merely accepting it, as doubtless was his duty, as "applicable and controlling" (vol. 1, p. 601).

The Department of Justice had participated as an intervenor in the proceedings before the District Court.

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[4] *Sic*, although, of course, only the acquisition of stock could be in violation of Section 7 of the Clayton Act.

Thereafter petitioner, uncertain whether that intervention would cause the case ultimately to be construed as one under the anti-trust laws, filed, simultaneously, appeals both to this Court and the Sixth Circuit Court of Appeals. Upon this Court's dismissal of the appeal to it, 322 U. S. 379, *supra*, the appeal to the Sixth Circuit Court of Appeals was heard and resulted in a reaffirmance of the prior decision, but upon an opinion (per Simons, C.J., 151 F. (2d) 461) entirely different in tone and content from the earlier opinion of the same Court per Hamilton, C.J., and which instead of providing that Columbia should "take nothing" by its claims provided that they should be "subordinated".

The Sixth Circuit Court of Appeals entered its order (October 9, 1945):

> "that the decree of the said District Court in this cause be and the same is hereby limited in remedy to the subordination of the Columbia claims and stock interests in each class to the claims and stock interests of others in such class, and so amended, the judgment is, affirmed".

In consequence, Columbia's claims on its First Mortgage Bonds of the operating companies were ranked ahead of the Debenture claims of other creditors of the operating companies and ahead of claims of holding company creditors which might derive through the holding company's ownership of operating company stocks or unsecured indebtedness. Thereupon, representatives of the Debenture holders petitioned for rehearing, and the Circuit Court of Appeals (without waiting for a reply from petitioner) entered an amendatory order (November 26, 1945) that:

> "The decree will be limited in remedy to the subordination of the Columbia claims to the claims of

all other creditors of every class, and as so amended the judgment is affirmed."[5]

After this second occasion of a decision by the learned Court below to the detriment of petitioner without a hearing having been accorded to petitioner, petitioner filed a petition for rehearing. The petition for rehearing was denied on January 21, 1946, in a *per curiam* opinion (153 F. (2d) 101).

(3) Findings of Fact.

(a) Introductory

Judge Ford's findings of fact are detailed and clear. As we have said, they were not amended by the Circuit Court of Appeals, although the Circuit Court of Appeals (notably in its final order of denial of petitioner's petition for rehearing) permitted itself some comment that went beyond the findings. However, as the judgment below was affirmed, the case comes before this Court upon the findings of Judge Ford which in substance and effect have become concurrent findings of two Courts below.

Before commenting upon them, we owe it to this Court to say frankly that, although Judge Ford presided over an extended trial with the greatest fairness, we cannot refrain

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[5]It will be noted that this amendatory order seems no longer to deal at all with stock claims no matter what their ownership. Since no distinction is made between creditor claims against the parent (American Fuel) and its subsidiaries (Inland and Kentucky Fuel) it would seem, in theory at least, that this order subordinates claims of Columbia on bonds secured by first mortgage on the Inland operating properties to claims of creditors of American Fuel whose claims might derive value from American Fuel's stock ownership of the subsidiary companies, thus in effect subordinating first mortgage claims to common stock.

from the view that he was necessarily influenced,—indeed, we are not sure but that it was his judicial duty to be influenced,—by the pre-judgment which had been expressed by the Appellate Court speaking through Judge Hamilton in his own Circuit. We would have liked, therefore, if it were open to us in this Court, to have sought review of the entire record, with a view to asking this Court to determine whether certain of Judge Ford's findings unfavorable to petitioner, should not be reversed. However, mindful of the rule in regard to concurrent judgments of two Courts below, and of the necessary limitations upon this Court's time, we are presenting this petition upon the basis that the findings represent the governing facts of the case.

We respectfully submit that one fact emerges as dominant from these findings: That no injury was done, or damage caused, to the other creditors by Columbia's action.

(b) Summary of the Findings

Inland and Kentucky Fuel were incorporated in 1927, by the same promoters, to acquire natural gas reserves in Eastern Kentucky. The promoters sold mortgage bonds and debentures, but took the entire common stock issues of both companies as their own compensation for services, in addition to a large percentage of the proceeds derived from the sale of the securities (FF 1, 2).[6] In 1928 the same promoters organized American Fuel & Power as a holding company for Inland and Kentucky Fuel, and sold notes of the holding company to the public. It also

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[6]FF refers to the numbered Findings of Fact, which are printed at page 590 of Volume I of the Record. In this Summary the petitioner is called "Columbia".

organized additional subsidiaries to acquire additional gas acreage and to engage in related operations (FF 3).

Columbia had no connection whatsoever with these promoters or this promotion.

Columbia was engaged in the operation of a great interstate enterprise and in the production, transmission, distribution and sale of natural gas in Kentucky, West Virginia, Ohio, Indiana, and other States (FF 4).

There was one vital difference between Columbia's operations and the operations of the "American Fuel & Power System". Columbia served both domestic and industrial consumers and was a public utility subject to the rules and regulations of State Public Utility Commissions as well as of municipal franchises. Columbia was accordingly required "to give preference to domestic consumers over industrial consumers when, by reason of cold weather or other conditions, the supply of natural gas was insufficient for both" (FF 5). The American Fuel System, on the other hand, served only industrial users and was, therefore, in a position to disregard the needs of domestic consumers, was "free from the handicap of municipal franchises and regulation by utility boards and commissions", and consequently "had a substantial competitive advantage over Columbia's subsidiaries" (FF 6). Such competition existed in 1928, 1929 and 1930, and because American Fuel & Power was able to "take away from Columbia" industrial customers, this competition had by the end of 1929 become "serious and threatening" (FF 7).

At the same time Columbia had an actual need for "a large increase" in gas reserves in American Fuel's territory and "considered that the gas acreage held by American Fuel and its subsidiaries would be a desirable adjunct to its (Columbia's) system" (FF 8).

Accordingly, the findings indicate that Columbia had a double motive to acquire the American Fuel & Power properties; first, to eliminate the competitive advantage arising out of their freedom to disregard the public utility regulation, and second, to acquire additional gas reserves for its own system.[7]

Inland and Kentucky Fuel "sustained substantial operating losses in 1928 and 1929." This was "due to their heavy burden of securities and burdensome gas contracts." "They were never able to earn their fixed charges." They were in a "precarious financial position" (FF 9).

This Court's attention is particularly called to these findings, that the First Mortgage bondholders were, at the height of the greatest period of prosperity in the United States, holding bonds of companies which had never earned their fixed charges and which even in "1928 and 1929" were operating at a loss. All of this, it should also be emphasized, was prior to any acquisition by Columbia of any securities of any of the American Fuel companies. Columbia had no part in giving those companies their "heavy burden of securities" or their "burdensome gas contracts", and had nothing to do with the fact that in the peak year of American prosperity they were in "precarious financial condition".

Columbia "acquired knowledge of the precarious financial position" of the American Fuel companies. It ascertained that their bond indentures contained the usual provisions that default could be declared upon failure to

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[7]Summaries and comments by us appear in indented paragraphs. The other paragraphs are close paraphrases of, or actual quotations from, the Findings.

meet interest or sinking fund requirements, upon the request of the holders of 25% in principal amount of the bonds. "Anticipating" that defaults and foreclosure proceedings must be the inevitable "eventuality", Columbia determined "to place itself in a position to force foreclosure and sale of the properties and afford it an opportunity to purchase them at a foreclosure sale". For this purpose it began to purchase bonds in the open market, and by April 1930 had acquired in excess of 25% in principal amount of the bonds of both (FF 9).

> The Court added a finding that Columbia "concealed the fact that it was the purchaser" (FF 9). Perhaps the Court considered that this was somehow a wrong on Columbia's part; and this may have colored the Court's views. But it is of the nature of the securities markets that purchases are made, on securities exchanges, through brokers and agents and, obviously, if a great concern like Columbia had publicized the fact that it was buying bonds in the open market, the only effect would have been to force the price up.

From the beginning of their operation, the American Fuel companies were under the management of the Hope Engineering Company. Its hope was to interest other promoters in building some outlet which would enable the companies to sell their gas. This was "its only hope of survival", for it "recognized the dubious financial condition of American Fuel and its subsidiaries". "'Hope' succeeded in inducing" other public utility promoters (referred to in the findings as the "Syndicate") to undertake "an ambitious plan" to build a gas pipe line right across Ohio from Kentucky to Detroit for sale and distribution of natural

gas to industrial enterprises only. The new promoters were "a prosperous and successful investment trust" and a banking firm "which had financed many gas enterprises throughout the country * * * and enjoyed wide experience in the promotion of such enterprises". The two constituted "a sufficient combination of financial strength and business experience to foreshadow success of the proposed plans and thereby prevent the impending financial collapse of the American Fuel System as anticipated by Columbia" (FF 10).

The Court will bear in mind that this Syndicate and this plan had no direct connection with the American Fuel System or contract with it. To the American Fuel System, its only hope was an indirect one: That this Syndicate might supply it with a customer. Also, it was late in 1929 that Hope first conceived the plan to build a line to Detroit and it was in January, 1930 that the Syndicate was formed. We assume that the Court will take judicial notice that "ambitious plans" of Wall Street investment trusts and merchant bankers were not then of a quality to lay firm foundations for future prosperity for mortgage bondholders of corporations already over-capitalized and failing to earn fixed charges.

The Syndicate acquired control of American Fuel. But independently, and not through American Fuel, it applied for a franchise to lay gas pipes in Detroit, entered upon a vigorous campaign to secure contracts from industrial consumers, surveyed and acquired a right of way, permits for river crossings, etc. The only physical act that it did was that it "started" the preliminary work preparatory to laying

pipes under the Ohio River. Its plan was eventually "to provide the money necessary" by a sale "to the public" of "a bond issue sufficient to finance completion." Toward that end, a favorable opinion was obtained from one "nationally known and highly reputable natural gas engineer" (FF 10).

> It will be recalled that the "false recovery" from the stock market crash of October 1929 had run its course by June 1930, after which the market continually declined for two full years during the deepening of the great depression. It was at this moment, as the District Court finds, that the hope of these companies lay only in a possible sale to the public of a bond issue "ambitiously planned" by promoters who had only plans, surveys and the "start" of one river crossing to offer as a basis for investment.

At the same time Columbia was making plans to supply natural gas to the Detroit area and was also surveying the Detroit market. Columbia did not need to run a line all the way from Kentucky, relying only on industrial consumers; it needed only to extend its lines from Toledo to Detroit (FF 11). Columbia's plans for a public utility subject to public utility regulation were "seriously threatened" by the Syndicate plans (FF 12).

> FF 12 also describes a third plan for building a pipe line from the Texas Panhandle and the Hugoton Gas fields of Kansas which threatened competition with Columbia, and a fourth plan by the United Carbon Company to build a natural gas pipe line to Cincinnati. FF 12 goes on to explain how Columbia bought out these two threatening enterprises. The purpose of the finding is

evidently to sustain the position that Columbia was seeking to eliminate competition in the area. But these facts need not here be considered in detail, as we are presenting our petition on the basis of the District Court's findings that one of the motives of Columbia at that time was to eliminate this sort of competition. It is precisely because this involved a collision with the anti-trust laws that the question arises in this case.

Through its open market operations Columbia had acquired by October 30, 1930, approximately 42% of the outstanding bonds and debentures of Kentucky Fuel and approximately 36% of the outstanding bonds and debentures of Inland, *representing an aggregate expenditure by Columbia of between three and four million dollars* (FF 12).

It was on October 30, 1930, that Columbia contracted to pay to the Syndicate $2,826,789.28 for the Syndicate's entire holdings in the American Fuel System and all related corporations. This was a profit to the Syndicate of $350,000. Columbia also provided additional profit to the Hope Engineering Corporation. All of the Syndicate directors having proffered their resignations, Columbia thereupon "promptly" precipitated receivership proceedings against Inland and Kentucky Fuel and caused their existing President (not a Columbia man) one W. E. Lockhart to be appointed Receiver (FF 13).

In other words, there was no material period during which Columbia exercised control. Having purchased the shares, it "promptly" precipitated receivership.

Even more important at this point is the fact that FF 13, as originally entered, concluded with the following sentence:

> "For a considerable period, the activities of the receiver of Inland, Kentucky Fuel and also of American Fuel and its other subsidiaries, both of whom were nominees of Columbia, were largely dominated by Columbia.";

and that, on reconsideration, the learned District Judge expressly struck this sentence out of the findings (I, 603). The District Court thus expressly excluded from the case any element of continuing wrongful control by Columbia over the receivership proceedings. This finding was based on ample evidence, for the receiver (Mr. Lockhart) was examined and cross-examined at length.

At the time of the negotiations of purchase by Columbia (presumably the Summer and Autumn of 1930), the leader of the Syndicate (Mr. O. R. Seagraves, President of Moody-Seagraves Company) had had his confidence in the project "considerably shaken by reason of the financial depression throughout the country and the depleted financial strength of the members of the Syndicate by reason thereof". The other members of the Syndicate did not "*fully*[8] share the views of Mr. Seagraves" and were principally induced by the large profits that they expected to receive from Columbia (FF 14). In fact, "the Syndicate was encountering unexpected obstacles and difficulties in the promotion of its plans for the Detroit project". It had "not abandoned them". It "was ready, able and willing to continue its *efforts* to develop the project." "Whether it would have ultimately succeeded is a matter which lies entirely in the realm of speculation." (FF 15).

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[8]All italics ours.

The Court will observe the effort of the District Court to maintain an even balance. On the one hand, it recognizes the financial depression, the depleted financial strength of the Syndicate members themselves, the consequent shaken faith of its leader, the unexpected obstacles and difficulties actually encountered in the promotion. On the other hand, there is the caution that the Syndicate members did have another motive in withdrawing, viz. large profits, that although they shared the views of their leader they did not "fully" share them, that they had not actually "abandoned" the project, and that they were still prepared to make an "effort". Finally, the Judge strikes a balance between the two, and leaves us with the ultimate finding that whether the Syndicate would have succeeded is a matter which lies entirely "in the realm of speculation". We respectfully submit that this is the maximum that can be said of the aspirations of this Syndicate at the time in question. And the Court will add the further speculative element that had the Syndicate by some miracle succeeded, it would not have been for the account of Inland and Kentucky Fuel, except that indirectly they might have benefitted by finding an outlet for the gas which they were required to purchase under their "burdensome contracts."

At the same time, viz. prior to the purchase by Columbia of the Syndicate, certain of Columbia's responsible executive officers had said in substance and effect "that it would not lie idly by and permit the construction of a pipe line through the heart of its territory as proposed by the Syndicate". (FF 16).

This is, of course, the finding that Columbia had an intention to eliminate the menace and threat of competition.

There remains the one ultimate finding, which is, in the language of the Anti-Trust Act itself (and therefore not an evidentiary finding) that Columbia "was engaged in a conspiracy, the object, purpose and effect of which was to restrain and monopolize the trade and commerce in natural gas in and between the States of Kentucky, Ohio, West Virginia, Indiana and Michigan"; that the claims "were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy"; and that the plans of Columbia to acquire the properties themselves as an adjunct to the Columbia System were "merely collateral and incidental to the main purpose of the conspiracy." (FF 17).

Just as the District Court's findings maintained an even balance as to any possibility of the Syndicate realizing its hopes—finding this "entirely in the realm of speculation"—so also the Court maintained something of a balance as to the motives for Columbia's action. It clearly found that two motives existed.

One of the motives was the acquisition of gas reserves for Columbia's Seaboard line. The findings are specific that Columbia was engaged in the construction of the Seaboard line from the Kentucky fields to the cities of Washington, Baltimore and Philadelphia; that this called for "a large increase in Columbia's holdings of gas reserves in West Virginia and Eastern Kentucky"; that Columbia entered upon a "large scale program for increasing its gas acreage in that territory" and that it considered that "the gas acreage held by

American Fuel and its subsidiaries would be a desirable adjunct to its system." (FF 8). The gas acreage of Kentucky Fuel Gas Company alone represented an investment by that Company of $3,000,000 (FF 2).

Secondly, the District Court finds that Columbia was motivated by a desire to purchase freedom from competition. American Fuel's freedom from the handicap of "regulation by utility boards and commissions" gave it a "substantial competitive advantage" and this had become serious and threatening to Columbia (FF 5, 6, and 7). Columbia's plans for the development of its business in the Detroit field were "seriously threatened" by the plans for the American Fuel System (FF 12).

Whatever relative weight one ascribes to the two motives which the District Court so finds as the inducements for Columbia's investment in securities of the American Fuel Systems (and the District Court in its ultimate finding, FF 17, makes the legitimate reason collateral and incidental to that of suppressing competition) this much the findings make clear: (1) Columbia paid large sums to purchase securities for value—in substantial part open market purchases of mortgage bonds —for the acquisition of which there *was* a legitimate business reason; (2) no damage or injury to other holders of securities of American Fuel resulted from this acquisition.

(c) Comment on Findings of Fact.

Nowhere in the findings, either in the evidentiary or in the final conclusory finding, is there any statement that the

other creditors were financially damaged by Columbia's buying in.

The findings show that as of 1930 the other creditors were at the fork of the road. If Columbia had not bought in, they would have entered the great depression as owners of securities in a company that had been over-capitalized, that had burdensome gas contracts, that had earned no profits during the years of prosperity, and whose sole hope of profit lay in the financing by a Wall Street Syndicate during the depression of a bond issue to make real an ambitious plan to sell only to private industrial purchasers after building for the purpose a pipe line across three states. We respectfully submit that it is obvious that under these conditions the value of the bonds would have been entirely wiped out. The alternative road was for Columbia to eliminate the promoters, foreclose the mortgage and effect an orderly liquidation in which the other creditors and itself might fairly share in proportion to their respective investments.

JURISDICTION

Jurisdiction of this Court is invoked under Judicial Code, §240-(a), as amended by the Act of June 7, 1934 (48 Stat. 926, 28 U.S.C. §347-(a)). The date of the judgment of the United States Circuit Court of Appeals for the Sixth Circuit to be reviewed was entered October 9, 1945, as amended by order of said Circuit Court of Appeals entered November 26, 1945. A petition for rehearing and modification of said judgment, as amended, of said Circuit Court of Appeals was denied by said Court by order entered January 21, 1946. On April 12, 1946, an order was granted by

Honorable Harlan F. Stone extending the time for filing the petition for certiorari to June 1, 1946.

QUESTION PRESENTED

Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquiring the credit he violated the anti-trust laws, be subordinated to other creditors?

Reasons Relied on for the Allowance of the Writ

(1) The case presents an important question in the fields of Federal Bankruptcy and Anti-Trust Law not previously considered by this Court.

(2) The decision of the Court below is in conflict with the decision of this Court in *Hartford Empire Co.* v. *United States,* 323 U.S. 386.

(3) The decision of the Court below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Dunlop* v. *Mercer* (*Re Dunlop*), 156 Fed. 545, where in a bankruptcy case, the Court said, at p. 555:

> "The general rule that an illegal contract is void and unenforceable is, however, not without exception. * * * It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power." (Citing many cases)

(4) The decision of the Court below is in conflict with the very recent decision of the United States District Court for the Southern District of New York in *Standard Oil Company* v. *Markham,* 61 F. Supp. 813 (June 1, 1945).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the judgments of the Circuit Court of Appeals, as amended, be reversed; and that your petitioner be granted such other and further relief as may seem proper.

COLUMBIA GAS & ELECTRIC CORPORATION,

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May 29, 1946.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered no opinion, its decision being embodied in Findings of Fact and Conclusions of Law filed September 3, 1943 (vol. 1, p. 590). The opinion of the Circuit Court of Appeals, in the form in which originally rendered on October 9, 1945 (vol. 9, pp. 3-23) was not reported, but as amended by the court's order of November 26, 1945, it has been reported at 151 F. (2d) 470 (vol. 9, p. 46). The opinion of the Circuit Court of Appeals denying the petitions for rehearing (vol. 9, pp. 56-57) has been reported at 153 F. (2d) 101.

ARGUMENT

POINT I

THE JUDGMENT OF THE COURT BELOW WAS ERRONEOUS BECAUSE IT INFLICTED A PENALTY UPON COLUMBIA WHICH IS NOT PRESCRIBED BY THE FEDERAL ANTI-TRUST STATUTES.

The judgment of the Court below is that Columbia's claim against the companies in the American Fuel System be subordinated to those of all other creditors, because it acquired such claims in violation of the Federal Anti-Trust Statutes.

As set forth in the History of the Litigation, this Court in its *per curiam* opinion dismissing the direct appeal of this case (*Columbia Gas & Electric Corporation* v. *American Fuel and Power Company*, 322 U. S. 379, May 22, 1944) made clear that this is not a proceeding to enforce penalties in the public interest, but a bankruptcy proceeding under Chapter X—governed by the considerations

which determine the administration of an estate among private claimants.

The Federal Anti-Trust Statutes prescribe expressly the penalties for their violation. None of these penalties would support the judgment of the Court below subordinating Columbia's claims. Consequently, the Circuit Court's decision conflicts with the decision of this Court in *Hartford Empire Co.* v. *United States,* 323 U. S. 386. There the decree of the District Court had required that the patents of the defendant glass companies, which had been used in contravention of the Anti-Trust Laws, should be thereafter licensed by the defendant companies royalty-free for the life of the patents. This Court held that this requirement constituted a confiscation of the property rights of the glass companies in the patents and went beyond the power given to a court under the Anti-Trust Statutes. The Court said as follows:

> "The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations."

This is in accordance with the well established principle (as stated by this Court in *Farmers, etc. National Bank* v. *Dearing,* 91 U. S. 29, 35 (1875)), that:

> "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

This principle was first established with reference to the Anti-Trust Act in the leading case of *Paine Lumber Co.* v. *Neale,* 244 U. S. 459, (1917), which was a suit brought by a private party for an injunction to restrain a violation of the Federal Anti-trust law under Section 4 of the Sherman Act. It was held, in dismissing the suit, that only the Attorney General could bring such a proceeding because he was specified in the Sherman Act as authorized to bring such a proceeding and the specification of him and the lack of specification of a private party made the remedy unavailable to a private plaintiff. This was followed by *Geddes* v. *Anaconda Mining Co.,* 254 U. S. 590 (1921), which was a bill by minority stockholders of one copper company to set aside its sale to another company, on the ground that the sale was for the purpose of restraining trade. It was held that the bill could not be sustained under the Sherman Act, the court saying (p. 593):

> "It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.,* 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471; *United States* v. *Babcock,* 250 U. S. 328, 331."

The case of *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U. S. 165 (1915), referred to in the foregoing quotation, was a suit by a seller of goods against the buyer to recover the purchase price and the defense was made that the buyer was an illegal combination under the Sherman Act. This defense the Court held to be without merit saying, at page 174:

> "It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of the courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' * * *"

It will be noted that these cases were decided under the Sherman Act as it stood before the passage of the Clayton Act in 1914 which expressly gave a private party the right to enjoin violations of the Anti-Trust Act; however, the principle upon which these decisions were based remains law.

This principle has been often applied, and many times in holding that, although a property owner or creditor may have violated some penal statute in acquiring the property or the debt owing him, he does not forfeit his property or his right to collect the debt, but only the statutory remedy may be enforced against him.

Harris v. *Runnels,* 12 How. (53 U. S.) 79 (1851);

McBroom v. *Scottish Investment Co.,* 153 U. S. 318 (1894);

Yates v. *Jones National Bank,* 206 U. S. 158 (1907);

Fritts v. *Palmer,* 132 U. S. 282 (1889).

In a recent case closely analogous to the case at bar the United States District Court for the Southern District of

New York, following the principle above stated, has held that a party to an illegal combination restraining competition is not deprived of legal protection of his property. *Standard Oil Company* v. *Markham,* 61 F. Supp. 813 (June 1, 1945). In that case Standard Oil and three associated companies brought an action under §9(a) of the Trading With The Enemy Act to recover from the Alien Property Custodian thousands of United States patents and certain shares of stock in various corporations. Plaintiffs alleged that they were the owners of those assets; that they acquired them from I. G. Farbenindustrie; that the Custodian vested these assets in himself, and that plaintiffs were entitled to have those assets returned. The Custodian asserted as a defense to the action that plaintiffs acquired the assets in question by agreements which violated the Anti-Trust laws of the United States. The holding of the Court was that the defense asserted by the Custodian was invalid. Pointing to the ramifications of the Custodian's argument, the Court said:

> "In considering the validity of this defense the first point is to observe the inevitable breadth of the Custodian's contention. If the Custodian is correct in his contention that relief should be denied where the claimed property was acquired in violation of the federal anti-trust laws, it would seem that relief should also be denied where the claimed property was acquired in violation of any other federal law, or any state law, or any foreign law. There is no hierarchy of laws in which the anti-trust laws are given peculiarly high rank. And the anti-trust laws, as the Supreme Court has recently recognized in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 415, 65 S. Ct. 373, have no provision that patents used in violation of these laws shall be forfeited" (p. 814).

The Court further pointed out that authority as well as logic compelled rejection of the Custodian's contention:

> "The unsoundness of the Custodian's defense under the anti-trust laws is revealed not alone by the breadth of its necessary implications, but by cases such as *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 549-551, 22 S. Ct. 431, 46 L. Ed. 679, and *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 253, 45 S. Ct. 300, 69 L. Ed. 597. These cases hold that where a person engaged in and acting pursuant to a conspiracy to violate the anti-trust laws makes a contract which is not inherently invalid he can enforce that contract against the other party. Similarly, where a person has acquired property by a contract in restraint of trade he can recover the property from a wrongful taker. *California Cured Fruit Ass'n.* v. *Stelling et al.*, 141 Cal. 713, 75 P. 320, 322." (p. 815)

The principle to be derived from controlling authority was stated by the Court in the following language:

> "These authorities illustrate the rule, that a party to a previous illegal contract, agreement or combination with others, restraining competition in that business is not deprived of legal protection of his property in that business. American Law Institute, Restatement of Contracts Sec. 519; Williston, Contracts, Rev. Ed., Sec. 1661. Such a rule embodies the broad principle that while one who has acquired property in violation of law is subject to whatever personal penalties and infirmities of title that law provides, he is not an outlaw and his title to property is not subject to collateral attack. See, *Bowmakers, Ld.*, v. *Barnet Instruments, Ld.* [1945] 1 K. B. 65, 71 (C.A.)." (p. 815)

Distinguishing the principle of the *Morton Salt* case from the case before it the Court said:

> "Although the Custodian places no reliance on *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488, 62 S. Ct. 402, 86 L. Ed. 363, perhaps a word should be said about its doctrine, particularly since it is in square conflict with the second illustration given for Sec. 519 of the Restatement of Contracts, cited two paragraphs above. As explained in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 415, 416, 65 S. Ct. 373, the Morton Salt Co. case stands for the proposition that so long as a patent owner is using his patent in violation of the anti-trust laws he cannot restrain infringement of it by others. In the instant case plaintiffs, whatever may have been their past conduct, are not currently using the patents here involved in violation of the anti-trust laws." (p. 815) * * * "Furthermore it would be a bold interpretation which would carry the doctrine of that case beyond giving an infringer a defense against a patentee. It is hard to suppose that the Supreme Court meant to indicate that anyone may without accountability to a patentee take from him a patent he is using in violation of the anti-trust laws. See *Hartford Empire Company* v. *United States,* supra." (p. 815)

The far reaching implications of the principle here at issue is illustrated by the decision in *Standard Oil Company* v. *Markham.* The holding of the Courts below is in direct conflict with the *Standard Oil Company* decision, and it is respectfully submitted that, because of the latter's persuasive argument and adherence to long established rules of law, it is entitled to great respect.

POINT II

THE PENALTY IMPOSED BELOW, IN THE ABSENCE OF INJURY TO THE INTERESTS OF OTHER SECURITY HOLDERS RESULTING FROM COLUMBIA'S PURCHASE OF AMERICAN FUEL SECURITIES, WAS BEYOND THE GENERAL EQUITY POWERS OF THE COURT.

The Circuit Court in its opinion holds that the rule restricting penalties for Anti-Trust infractions to those prescribed by statute is not applicable to the case at bar, because the District Court, sitting as bankruptcy court, "* * * imposed no penalty; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity."

This is to hold in substance and effect that a bankruptcy court has greater power of imposing penalties for infraction of the Anti-Trust laws than have the courts of equity which are entrusted with their enforcement by the statutes themselves. This is in direct conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Dunlop* v. *Mercer (Re Dunlop),* 156 Fed. 545, app. dismissed 212 U. S. 588, a bankruptcy case, where the court's opinion at page 555 reads as follows:

> "The general rule that an illegal contract is void and unenforceable is, however, not without exception. * * * It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power." (Citing many cases.)

The doctrines of *Pepper* v. *Litton*, 308 U. S. 295, and *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, are not new but stem from principles of equity jurisprudence whose principal example in this country is in the famous *New York Central* case, *Farmers Loan & Trust Company* v. *New York & Northern Railway Company*, 150 N. Y. 410. An understanding of that case requires it to be contrasted with the earlier decision of the same New York Court of Appeals in *Morris* v. *Tuthill*, 72 N. Y. 575, which was expressly approved and reaffirmed in the *New York Central* case, 150 N. Y. at p. 432. In *Morris* v. *Tuthill*, the defendant, actuated by malice toward a mortgagor, had conspired with the mortgagee to acquire the mortgage in order that he might foreclose. Here was an extreme case of the making of an investment in property for a malicious and wrongful purpose. The Court held that that was no ground to deprive the investor of his property right, saying:

> "The motives of the former owner of the mortgages in selling, or of the plaintiffs in buying them, are not material, and the appellant has no concern with the consideration of the assignment. It is sufficient that the mortgage debt is due, and has been transferred to and is now owned by the plaintiff. He may have bought it from motives of malice toward the defendant and solely with a view to sue upon them, and the former owner from a like motive may have transferred them without consideration, but this would not constitute a defense to the action. The appellant can only arrest the action by paying the amount due, or tendering the same and bringing it into court. The facts stated do not constitute an equitable defense to the mortgages, or impeach the plaintiff's title."

This Court cited and quoted at length from *Morris* v. *Tuthill* in its decision of *Dickerman* v. *Northern Trust Company,* 176 U. S. 181, at 190. The decision is thus summarized in the head-note:

> "*Held:* That, while these proceedings were taken by connivance and consent of the parties, they were not collusive in a legal sense, as the debt was honestly due and the plaintiff entitled to the judgment. *Held, also:* That while the judgment was obtained for the obvious purpose of enabling the trustees to declare the mortgage to be due, the court would not inquire into the motives of the parties" (p. 181).

The *Deep Rock* case and the other Supreme Court cases which have applied the doctrine have made clear that the mismanagement, domination or other unlawful conduct must, in order to bring the *Deep Rock* principle into play, have resulted in *injury* to the other securityholders.

The doctrine of the *Deep Rock Oil* case was predicated on the underlying fact that the action of the securityholder whose claims were subordinated had injured the other securityholders. The subordination of the claim of the Standard Gas & Electric Company, which was attempting to assert its claim for advances to the Deep Rock Oil Company, was, according to the description of the *Deep Rock* case in the subsequent case of *Pepper* v. *Litton,* 308 U. S. 295, at 308 "based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard *to the detriment of the public investors*". In these words, this Court made it clear that the *Deep Rock Oil* case was decided on facts which showed that the Standard Company's mismanagement had injured the other securityholders. The same language occurred in the *Deep Rock* case itself (306 U. S.

at 322), where the court said that the District Court was required as a court of equity "to recognize the rights and the status of the preferred stockholders arising out of Standard's wrongful *and injurious* conduct in the mismanagement of Deep Rock's affairs"; and it also stated (p. 323) that "Deep Rock finds itself bankrupt not only because of the enormous sums it owes Standard but because of the abuses in management due to the paramount interest of interlocking officers and directors in the preservation of Standard's position, as at once proprietor and creditor of Deep Rock."

Obviously, the history of the case at bar is entirely different from the history in the *Deep Rock* case. The District Court made no specific finding of injury to the American Fuel System or its securityholders resulting from Columbia's acquisition of the American Fuel Securities. In the *Deep Rock* case this Court said with utmost emphasis that Deep Rock's difficulties were due to the long years of mismanagement by Standard Gas and this mismanagement had injured the other securityholders. The opinion is replete with instances of the actual injury that Standard had done to Deep Rock—inadequate initial capitalization (306 U. S. 323), huge rentals charged it year after year for plants that were operated at a loss (p. 319), advances charged it for the payment of improvident dividends (pp. 317, 323), excessive management fees (pp. 319-20), interest on advances at the rate of seven per cent. per annum compounded monthly (p. 320) and other abuses too numerous to mention here.

Nothing of the sort appears in the present record. Columbia did not purchase control of American Fuel until November 6, 1930; and its financial embarrassment had crystallized long before that. Inland and Kentucky Fuel

went into receivership less than a month after the purchase, on December 2, 1930, after which date they were no longer under Columbia management but that of the receiver of the District Court.

The bonds here in question had been issued by the bankrupts to purchasers other than Columbia and had been owned by those who purchased them for years before Columbia bought them. They were valid outstanding claims against the bankrupt companies and when Columbia purchased them it purchased valid claims and held them as its property.

It is respectfully submitted that there is no principle of bankruptcy law which permits that claims valid at their inception and constituting a property right be subordinated in the hands of a purchaser who has obtained them in contravention of the Anti-Trust laws.

Respectfully submitted,

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